Town & Country LP Gas Service Co. *and* Charles I. Tressler. Case 14-CA-13941

April 23, 1981

DECISION AND ORDER

On November 28, 1980, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in opposition to the General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Respondent is engaged in the retail and nonretail sale and distribution of cylinder and bulk propane gas, gas appliances, and related products from its Chester, Illinois, facility. Respondent's parent company, Dashner Gas Service Co., is located in Red Bud, Illinois, approximately 22 miles from Chester. Although the two entities are commonly owned by Vernon Dashner, who is the president of both, the two companies generally operate independently, have virtually no employee interchange, and have separate payrolls and clientele. Respondent employs two truckdrivers, Charles Tressler and Ed Roche, and two clericals at its Chester facility. At all times material herein, the truckdrivers have been represented by Teamsters Local Union No. 50, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the Union. The most recent collective-bargaining agreement between the Union and Respondent by its terms expired on April 30, 1980. As of the date of the hearing in this matter, no new collective-bargaining agreement had been executed.

Tressler began working for Respondent in June 1978. Between approximately September 1979 and late February 1980, Tressler regularly drove one of Respondent's pickup trucks home with him for the purpose of making night service calls. Respondent's other truckdriver, Roche, also drove one of Respondent's trucks home at night. Dashner was aware that his divers were taking the trucks home at night and raised no objections. On March 21, 1980,[1] Dashner fired Tressler, ostensibly for unauthorized use of Respondent's pickup truck. On March 31, pursuant to the contractual grievance procedure, Tressler filed a grievance with the Union over his discharge. Shortly thereafter, Tressler also filed an unfair labor practice charge with the Board. In late April, Dashner and his attorney met with the Union's secretary-treasurer, John Ferguson, to discuss the imminent expiration of the collective-bargaining agreement. During the course of the meeting, Ferguson demanded that Dashner reinstate Tressler. When Dashner refused to do so, Ferguson announced that he would proceed to arbitration on the grievance. Later that afternoon, Ferguson delivered to Dashner's attorney, Giannini, a petition requesting arbitration of the grievance. Approximately 1 week later, Giannini telephoned Ferguson and announced that, in settlement of the grievance, Respondent would reinstate Tressler with full backpay. On or about May 13, Tressler returned to his former job. At approximately the same time, Tressler withdrew his unfair labor practice charge.

Approximately 1 week after Tressler returned to work, he was laid off for 2 days per week. These layoffs continued for the next several weeks. On June 19, Tressler filed a charge with the Board alleging that these layoffs violated Section 8(a)(3) and (1) of the Act. In or around mid-June, Dashner presented Tressler with a document entitled "Invoice," which billed Tressler for the use of Respondent's truck between July 1979 and March 1980. The document itemized weekly rental cost, mileage, gas, and insurance, and totaled $4,194. Upon tender of the document, Dashner told Tressler that: "You've got your backpay and I want my money." On June 27, Dashner asked Tressler whether he (Tressler) had the money he owed Dashner for use of the truck. When Tressler replied that he did not, Dashner instructed him to turn in his keys. At the same time, Dashner gave Tressler a discharge notice stating that, due to a decline in gas sales, it was "no longer good business practice, judgment or profitable operation to continue with two employees." The discharge was effective that same day.

The instant complaint alleges, *inter alia*, that Respondent: (1) violated Section 8(a)(1) of the Act by demanding that Tressler pay for the use of Respondent's truck; (2) violated Section 8(a)(3) and (1) of the Act by discriminatorily laying off Tressler, and (3) violated Section 8(a)(4), (3), and (1) by discriminatorily discharging Tressler, all in retaliation for Tressler's successful prosecution, with union assistance, of his grievance over his earlier discharge and his filing of unfair labor practice charges with the Board.[2]

With respect to the 8(a)(1) allegation, it is undisputed that Tressler regularly drove Respondent's

[1] Unless otherwise noted, all dates refer to 1980.

[2] The Administrative Law Judge's statement of the issues presented is erroneous.

pickup truck home for the purpose of making night service calls, and that Respondent's other truckdriver did the same. It is further undisputed that this use of the pickup truck was known to Dashner, and that he raised no objections to such use at any time prior to March 21. On that date, however, without any prior warning, Dashner discharged Tressler for taking the truck home despite the fact that Tressler had ceased driving the pickup home some time earlier. No similar action, or discipline of any type, was taken against the other driver, Roche, or against an office employee who occasionally used the pickup truck to go home for lunch. Tressler thereafter contacted the Union and invoked the contractual grievance procedure, and the matter was settled by Respondent's reinstating Tressler with full backpay.[3] Shortly thereafter, in mid-June, Dashner presented Tressler with the "Invoice" described above. Dashner mentioned the backpay Tressler had received and told him that he (Dashner) would get his money "one way or another." Dashner further told Tressler, "You got your backpay and I want my money." These statements, together with the surrounding circumstances, are strongly indicative of retaliation against Tressler for filing his grievance and for its determination in favor of Tressler. It is well settled that an individual's filing of a grievance under a contractual grievance procedure is concerted activity protected by Section 7 of the Act. See, e.g., *Selwyn Shoe Manufacturing Corporation*, 172 NLRB 674, 681 (1968), enfd. in relevant part 428 F.2d 217 (8th Cir. 1970). Similarly, remarks tending to inhibit employee utilization of contractual grievance machinery are violative of Section 8(a)(1) of the Act. *Northwest Drayage Company*, 201 NLRB 749 (1973). In the instant case, we find that Dashner's demand that Tressler tender Respondent over $4,000 for "rental" of Respondent's truck was simply a way "to get even" with Tressler for his successful prosecution of the grievance concerning his earlier discharge.[4] Obviously, such retaliation against an employee for having engaged in protected concerted activities is violative of Section 8(a)(1) of the Act, and we so find.

As stated above, upon Tressler's return to Respondent's employ on May 13, Respondent began laying off Tressler for approximately 2 days per week. Respondent contends that the layoffs were not discriminatorily motivated, but rather were due to lack of work. We do not agree. The record clearly reveals that Respondent's business operations were disrupted due to a shortage of personnel during Tressler's layoffs, and that this shortage necessitated rescheduling gas deliveries and other work on several occasions. The record further reveals that, on at least 2 days when Tressler was on layoff status, Dashner himself was forced to make gas deliveries to customers—work which Dashner did not normally perform. Additionally, on several occasions when Tressler was laid off, Respondent was forced to utilize employees from its parent facility some 22 miles distant in order to do the work Tressler would normally perform. The most telling incident, however, occurred when Dashner ordered that Tressler be laid off on June 18 and 19, at the same time that Roche, the only other truckdriver employed by Respondent, was on vacation. On that occasion, secretary Fleming asked Dashner, "What should I do if people are out of gas or if there are some cylinders to be delivered?" Dashner replied, "Well, you'll just have to put them off. If we have to lose customers, we'll lose customers." This evidence, which is uncontradicted on the record although Dashner was present at the hearing and testified, clearly illustrates the pretextual nature of the reason given for Tressler's layoff. The record thus does not indicate an employer suffering from a lack of business. Rather, the record as a whole clearly indicates that Respondent was willing to go to almost any length to penalize Tressler. That the retaliation against him was due to his successful prosecution of the grievance over his first discharge, with union assistance, is shown by the timing and precipitate nature of the layoffs, as well as the shown falsity of the asserted reason. See, e.g., *L'Eggs Products Incorporated*, 236 NLRB 354, 356-369 (1978); *Arkansas-Louisiana Gas Company*, 142 NLRB 1083 (1963); and *N.L.R.B.* v. *Montgomery Ward & Co., Inc.*, 242 F.2d 497 (2d Cir. 1957), enfg. 115 NLRB 645 (1956). Accordingly, we find that the true reason for Tressler's repeated layoffs was his contacting the Union about and his successful prosecution of the grievance concerning the first discharge. We further find that, by discriminating against Tressler because of his union and grievance activities, Respondent violated Section 8(a)(3) and (1) of the Act.

The facts surrounding Tressler's discharge on June 27 are simply stated. At the conclusion of his shift, at approximately 4:30 p.m., Tressler was present at Respondent's office. Dashner approached Tressler and asked him if he "had his money" for the use of Respondent's pickup truck. Tressler said, "No, I can't come up with that kind of money." Dashner replied, "Well, turn in your keys," and then handed Tressler a discharge notice. The

[3] The March 21 discharge is not alleged to be an unfair labor practice, but the facts concerning the matter were introduced as background evidence.

[4] In this regard, we note that no similar demand for "rental" was made on Roche, even though Roche freely admitted that he, unlike Tressler, utilized Respondent's pickup truck for personal use.

notice stated that Tressler was discharged due to a decrease in Respondent's gas sales. Approximately 3 days later, Tressler received a statement from Respondent charging him $62.91 for interest on the unpaid truck rental invoice.

Respondent maintains that Tressler was discharged for valid economic reasons. To the contrary, the General Counsel contends that Respondent's economic defense is a sham and that the true reason Tressler was discharged was his filing of charges with the Board[5] and his successful utilization of the contractual grievance procedure with assistance from the Union. We now turn to these contentions.

The General Counsel argues that he has established a *prima facie* case of an unlawfully motivated discharge, requiring Respondent to come forward with a plausible explanation for its decision to terminate Tressler's employment. We agree. As found above, Respondent retaliated against Tressler's enlisting the assistance of the Union and successfully grieving his first discharge by, upon his reinstatement, quickly using the stratagem of laying off Tressler for pretextual reasons, and by demanding over $4,000 for "rental" of its truck. These violations of the Act illustrate that Respondent harbored animus toward Tressler's protected and union activities, and provide evidence that Respondent's subsequent discharge of Tressler was the result of an illegal motive. Further supporting the establishment of a *prima facie* case by the General Counsel is the timing of the discharge, which occurred just a brief time after Tressler's protected and union activities, and an even shorter time after the discriminatory layoffs discussed above. Thus, the burden shifts to Respondent to come forward with a plausible explanation for Tressler's discharge. *Westinghouse Electric Corporation*, 235 NLRB 356 (1978); *Union Camp Corporation, Building Products Div.*, 194 NLRB 933 (1972).

As stated earlier, Respondent contends that it discharged Tressler solely for a valid economic reason, to wit, a decline in gas sales. Dashner testified that Respondent's retail gas sales had declined, and that Respondent could no longer afford to carry two truckdrivers on its payroll. In support of its argument, Respondent relies upon an unaudited statement of income and retained earnings showing that, for the fiscal year ending June 30, Respondent had a net loss of $7,580.36, compared to a net profit of $422.17 for the fiscal year ending June 30, 1979. We find Respondent's reliance on the income statement misplaced. First, we note that the statement was unaudited and was prepared over 1 month *after* Tressler was discharged. We further note that the statement introduced into evidence is not a complete document, refers on its face to the complete accountant's review report, and carries a *caveat* stating that the accompanying notes, which were not introduced into evidence, are an integral part of the financial statement. However, even if we were to accept fully Respondent's income statement, even a cursory examination of the statement shows that Respondent's gas sales actually increased from $270,159.85 in 1979 to $297,994.91 in 1980, and that Respondent's total income increased a comparable amount. The financial statement further shows that the cause of Respondent's alleged financial loss in 1980 was a large increase in cost of sales. Under these circumstances, and in view of the absence of record testimony explaining this seeming inconsistency, we find that Respondent's financial statement is entitled to little weight.

There remains for consideration Dashner's testimony that Respondent's gas sales volume had declined, obviating the need for the employment of two truckdrivers. However, Dashner's statement is contradicted by the testimony of other witnesses. Tressler testified that the volume of work during May and June was actually greater than that of the previous two summers. Roche testified that the volume of work during the summer of 1980 was approximately equal to the volume of work during the summers of 1978 and 1979. Finally, Arlou Wittenberg, Respondent's office employee responsible for maintaining records of the amounts of Respondent's gas and appliance sales, testified that there was no decrease in the drivers' amount of work in the summer of 1980 as compared with the summers of 1978 and 1979. On direct examination, Dashner stated that the testimony of Tressler, Roche, and Wittenberg concerning gas sales during the summer of 1980 was untrue, and that Respondent had accounting substantiation to verify that their testimony was inaccurate. However, Respondent failed to offer such substantiation into evidence. An inference thus arises that the claimed documents would not support Dashner's contentions. See *Suburban Ford, Inc.*, 248 NLRB 364, 369 (1980); *Zapex Corporation*, 235 NLRB 1237 (1978); *N.L.R.B.* v. *Treasure Lake, Inc., a subsidiary of Great Northern Development Co., Inc.*, 453 F.2d 202 (3d Cir. 1971).

Respondent also points out that no new employee was ever hired to replace Tressler. While the record fully supports Respondent's assertion, we deem that fact of only minor importance because the record further reveals that, following Tressler's discharge, employees from Respondent's parent company frequently would be transferred temporarily to perform Tressler's work. Prior to

[5] In addition to the withdrawn charge on June 19 Tressler filed a second charge alleging that his layoffs were discriminatorily motivated.

Tressler's discharge, however, employees from Respondent's parent were utilized only for special skilled work that Tressler and Roche were unqualified to perform.

For all the foregoing reasons, we reject Respondent's economic defense and find that its asserted reason for discharging Tressler—lack of work—was a pretext, contrived as an afterthought. Thus, at no time prior to the discriminatory layoffs was there any mention that Respondent was suffering from an economic decline. Indeed, in the conversation between Dashner and Tressler on June 27 which preceded the discharge notice, Dashner made no mention of any economic difficulties but did renew his demand that Tressler satisfy Respondent's claim for over $4,000 in "truck rental." The record thus establishes a pattern of retaliation against Tressler for his filing of charges with the Board, and his union and protected concerted activities. We conclude, therefore, that by engaging in such conduct, Respondent violated Section 8(a)(3), (4), and (1) of the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent Town & Country LP Gas Service Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local No. 50, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By demanding that the Charging Party, Charles Tressler, pay it a certain sum of money in reprisal for his successful use of the contractual grievance procedure, Respondent has violated Section 8(a)(1) of the Act.

4. By laying off and subsequently discharging the Charging Party, Charles Tressler, because he filed unfair labor practice charges under the Act and had engaged in other union and protected concerted activities, Respondent has violated Section 8(a)(3), (4), and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that Respondent discriminatorily laid off and subsequently discharged Charles Tressler, Respondent shall offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and shall make him whole for any loss of pay he may have suffered by reason of the discrimination against him. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Town & Country LP Gas Service Co., Chester, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Retaliating against its employees because they engage in protected concerted activities, including the filing and prosecution of grievances.

(b) Discharging or laying off employees because those employees filed unfair labor practice charges under the Act or engaged in other union or protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Charles Tressler immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on the backpay in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

(c) Post at its Chester, Illinois, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's duly authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not specifically found herein.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT retaliate against our employees because they engage in protected concerted activities, including the filing and prosecution of grievances.

WE WILL NOT discharge or lay off our employees because they file unfair labor practice charges under the Act or engage in other union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by the National Labor Relations Act.

WE WILL offer Charles Tressler immediate and full reinstatement to his former position or, if that position is no longer available, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges he previously enjoyed.

WE WILL make Charles Tressler whole for any loss of earnings he may have suffered as a result of our unlawful discrimination against him, with interest.

TOWN & COUNTRY LP GAS SERVICE CO.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held on September 23, 1980, in St. Louis, Missouri, on complaint of the General Counsel against Town & Country LP Gas Service Co., herein called the Respondent or the Company. The complaint issued on August 8, 1980, based on a charge filed on June 19, 1980, by Charles Tressler, an individual, herein called the Charging Party. The sole issue presented is whether the Respondent in fact discharged Tressler in violation of Section 8(a)(3) and (4) of the Act. Briefs were filed by the General Counsel and the Respondent after the close of the hearing.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Town & Country LP Gas Service Co., an Illinois corporation, is engaged in the retail and nonretail sale and distribution of cylinder and bulk propane gas, gas appliances, and related products. One of its locations is in Chester, Illinois, the only one involved in this proceeding. During the year ending June 1980, a representative period, the Respondent derived gross revenues in excess of $500,000 at this location and purchased cylinder and bulk propane gas and other appliances valued in excess of $50,000, which were delivered to this Illinois location from out-of-state sources. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Teamsters Local Union No. 50, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Case in Brief*

The Charging Party, Tressler, was a truckdriver, making deliveries of gas and equipment for the Respondent; he worked for 2 years, from June 1978 to June 1980. For a lengthy period, about 6 months, up to January 1980, he regularly used to drive one of the Company's trucks home with him as a convenience. Sometimes this arrangement served the Company's purpose, because there were night calls when Tressler made deliveries from his home, or otherwise went to customer locations to perform a service chore. This was regular work for which he was paid. Management knew all along about this arrangement and never once criticized Tressler for taking the pickup truck home, or told him to stop.

On March 21, 1979, about 2 months after this personal use of the company truck had ended, Vernon Dashner, the president of the Respondent, fired Tressler. The owner's stated reason, as proven by Tressler's uncontradicted testimony, was "for driving a pickup truck, unauthorized use of the pickup truck, and for gas burned off the pickup truck." There was a collective-bargaining agreement in effect at that time between the Respondent and Teamsters Local 50, the underlying appropriate bargaining unit being just two men—Tressler and the only other driver employed at this location, a man named Roche. That contract, by its terms, was about to expire on April 30. On March 31, Tressler filed a grievance under the contract arbitration procedures. He also filed an unfair labor practice charge with the National Labor Relations Board.

At or "about the time that the contract expired," according to the uncontradicted testimony of John Ferguson, the Teamsters secretary-treasurer, he met with Dashner and the company's lawyer, Giannini, in a restaurant to discuss the contract situation; the three men also talked of Tressler's grievance. Ferguson told the company representative "before we could do anything he [Tressler] must be returned to work . . . ." When Dashner refused, Ferguson said he would proceed to arbitration on the grievance. A week later the company lawyer called Ferguson to say Tressler would be reinstated with full backpay. Later that same day Dashner telephoned Ferguson and said, "I would like to meet with you on the contract next week sometime." In mid-May Tressler was put back to work, with backpay. The grievance died, Tressler withdrew his Labor Board charge, and the parties went ahead with their bargaining towards a new contract.

A month later, on June 27, the Company fired Tressler again. In "the middle part of June," according to Tressler—and his entire testimony in this case stands uncontradicted by any defense witness—Dashner handed him a document headed "Invoice"; it billed him for personal use of the company truck—daily rental cost, insurance, mileage to his home and back, and gasoline used—during the period July 1979 to March 1980, a total of $4,194. Called to the office on June 27, Dashner gave Tressler a discharge notice stating the reason was a substantial decline in the Company's sales. From Tressler's testimony:

> He asked me if I had his money that I owed him for driving the pickup truck home and I said no, that I couldn't come up with that kind of money. He said, "Well, turn in your keys." Then he handed me my notice. I asked him if he was going to pull the same shit again, so I just walked out the door. I asked him what he had against me . . . he was wanting his backpay and said he was going to get it one way or another . . . .

Tressler filed his original charge in this case on June 19, 1980, and an amendment thereto on July 14, 1980. The complaint says nothing about the March discharge. In multiple phrasing it says the Respondent refused to "reinstate" Tressler; refused to make him whole "for the loss of wages," and by such conduct committed an unfair labor practice. I read this language as saying that because the Respondent deviated from the settlement agreement reached with the Union when, as contractually agreed upon, it implemented the grievance procedure, it violated the statute. The complaint also says, albeit not quite clearly, that by discharging Tressler on June 27 it violated Section 8(a)(3) and (4) of the Act. As clarified in the General Counsel's brief, this is meant to allege that the Respondent's reason for discharging him the second time was because he had filed a grievance to protest the first discharge and because he had filed his original, later withdrawn, charge with the Board.

At the hearing Dashner, the only witness for the Respondent, said that he discharged the driver because of a decline in business. He denied any illegal motivation.

B. *Further Evidence, Analysis, and Conclusion*

I shall recommend dismissal of the complaint because the evidence does not suffice to prove affirmatively the commission of any unfair labor practice. Clear understanding of this case requires that a few unquestionable facts be stated first. Sometime in May, and the exact day is of little moment, the Company restored Tressler to regular full-time employment and paid him all the wages he had lost between the March 21 discharge and the moment he returned. About a week later, and again the precise day is not important, he started to lose a day or two of work weekly. Literally, the Company did comply with the settlement reached with the Union pursuant to the contract grievance procedure; it reinstated him with full backpay. In this literal sense, the complaint is wrong.

In just about a month after so reinstating Tressler, the Company fired him again. In a loose sense, I suppose, one could say this was the Company's way of reneging on its settlement agreement on the earlier grievance. If you look at the case in this light—but the complaint does not clearly make such a contention—the question becomes: Is it an unfair labor practice for an employer to refuse to comply with an arbitration decision, or a grievance settlement at any stage? I see no difference between contractually agreed-upon settlement of agreements at an earlier or a later stage. In his brief, the General Counsel does not make this argument. In truth he cannot, for the Board has clearly said, in a case involving a *Spielberg* arbitration award: ". . . we cannot agree that noncompli-

ance with the award should be a matter for the Board's concern." *Malrite of Wisconsin, Inc.*, 198 NLRB 241 (1972); *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

The real question here is "Why did the Respondent fire Tressler on June 27?" More precisely stated, under the law with which we are concerned, the question is: Has it been proven as a fact—by a preponderance of the affirmative evidence considering the record as a whole (*N.L.R.B.* v. *Glenn Raven Silk Mills, Inc.*, 203 F.2d 946 (4th Cir. 1953))—that the reason for the June 27 discharge was because Tressler had filed a grievance over his earlier discharge?

But before answering that question, there remains still another obliquely stated theory of illegality to be cleared away. The General Counsel went out of his way to prove that, starting quickly after the reinstatement, Tressler was laid off a few days each week; this was before the real critical discharge. The complaint calls these now-and-then layoff days refusals to live up to the settlement of the grievance, and therefore violations of the Act. If an arbitrator's "award" is to be distinguished from a mere compromise reached by the parties after the filing of a grievance, this part of the complaint must be read as saying the Respondent's refusal to yield fully on the grievance was because Tressler had filed the grievance. Not only is it not claimed, but there is not an iota of evidence in the least indicating that the March discharge was illegal. What all this amounts to is a bald contention that when a man is discharged and files a grievance it must be held automatically that, if the employer does not agree to put him back fully, his reason was because the man filed the grievance, and never mind the total lack of any proof of illegal motive. It is an unconvincing argument. The idea of guilt by presumption lost long ago. *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Los Angeles-Seattle Motor Express*] v. *N.L.R.B.*, 365 U.S. 667 (1961).

We come to the real question: Why was Tressler discharged in June? He was not told at that time it was because he had filed a grievance, or because of any union activity by anybody. It is an inference case, according to the General Counsel. The major contention in support of the suggested inference of illegal motive rests on the assertion that the apparent reason and the reasons stated by the Respondent at the time are false. The first is Tressler's refusal to satisfy Dashner's demand for the $4,000, only 10 days before the discharge. The second is that the business was in decline.

It is a fact, on this record, both that Dashner demanded the $4,000 from Tressler only 10 days before June 27 (see G.C. Exh. 2) and that in the discharge conversation that day Dashner told the driver it was that money he wanted—see Tressler's testimony set out above. These facts notwithstanding, I agree with the General Counsel that the claimed reimbursement for use of the company truck was not the true reason either for the discharge in March or for the discharge in June. Dashner knew all along, for 6 months, that Tressler was taking the truck home; his having it there not only was a convenience to the Company, but was necessary for the occasional night deliveries Tressler had to make; not once throughout the entire period did the owner find fault with the driver for doing that. Resort to that matter, as ostensible justification for the discharge, was a pure afterthought; it was used as a pretext to cover some other unstated reason.

I cannot so easily reject the Respondent's insistence that a decline in business was its reason in June. Dashner operates two locations—one in Chester, where Tressler worked, and one in Bedford, 22 miles away. No one was ever hired to replace Tressler. The Company just continued its business at this location with only one driver, Roche. Every so often after Tressler was let go a man would come from Bedford to do some work for the Respondent; even Dashner himself was seen several times over the following months making truck deliveries from Chester. But it is also a fact people used to come from Bedford to do special skilled work for the Respondent even before Tressler left. Further, even assuming there was a little more work out of this location than Roche alone could handle, it does not mean there was no logic or business justification in removing one unneeded full-timer altogether.

Of course this defense, articulated by Dashner at the hearing, suffers from the fact that he did argue with Tressler on June 27 about the $4,000 he wanted. I read in his words that day pure repetition of his March position that he wanted Tressler out of there because he had used the company truck without paying for it. If his reason for the discharge was lack of sales, why talk about a totally different subject so offensively?

With this, perhaps it can be said the reason advanced at the hearing—economic justification—is suspect. But it is not necessary to decide with absolute finality whether there existed in June reasonable business basis for the discharge, or whether in fact that was the true factor which motivated the Respondent in its final action. The primary burden of proving the unfair labor practice rests on the General Counsel. If he does not satisfy it, it matters not whether the Respondent's asserted reason is or is not credible. As has been said of old, an employer can fire a man for good reason, for a bad reason, or for no reason at all, just so it is not for a prohibited reason. If the employer is lying, his deception does not suffice to prove the complaint correct. There must be something of substance proving illegal motive in fact.

Two factual findings are absolutely warranted by this total record. The first is that, whatever its reason, the Respondent wanted to remove Tressler from its payroll. And the second is that that reason—again, whatever it may have been—was the same in June as it had been in March. It is this inescapable reality that dictates dismissal of the complaint. Tressler himself knew it when he told Dashner it was the same thing as before. That that "thing," euphemistically labeled by the driver, was not unlawful in March, must be accepted, because no one claims otherwise, because there is nothing to indicate improper motive then, and indeed because there was no union, or concerted, statutorily protected activity then being carried on by anybody. If it was the same unspoken motivation on both occasions, how can the second be called illegal if the first was not?

When Tressler was called to the office on June 27, Dashner started by asking "if I had his money that I owed him for driving the pickup home . . . . And I said no . . . . He said, 'Well, turn in your keys.' Then he handed me my notice." (The one which first ever mentioned a decline in volume of sales.) After some arguing and off-color language, Tressler told Dashner he was going to get in touch with his union representative. It was at this point that the owner "just started cussing and raising hell. He said he didn't want Stan [the union agent] down in that damned office or anything like that." It is this phrase out of Dashner's mouth, according to the prosecution, that proves that the owner's basic feeling was antiunion, or anti-the-filing-of-grievances. It will not do. Dashner did not raise the subject of the Union. Rather, more important, the discharge had been completed by that time, the two men were at loud-voiced luggerheads, and Dashner's outburst can hardly serve to offset the extended evidence, starting back in March, that, whatever he had in mind, it had nothing to do with any aspect of unionism.

There is another tidbit. The then office secretary, Arlou Whittenberg, was called by the General Counsel. She testified that sometime in April Dashner told her that "if anybody from the union called, he was out of the states." It then developed that Dashner did take off a few days later on a trip to Morocco. The secretary went on to say that, several weeks earlier, she heard Dashner say he had heard the drivers and the Union had formulated demands for contract renewal but that, "they wouldn't get what was on their proposal." And finally, Whittenberg also said that, on returning from Morocco, Dashner first asked her had anyone from the Union called, and then said, "If anybody calls, he was not reachable, because he didn't want to talk to anybody."

It will be recalled that, after agreeing with the Union's request that Tressler be reinstated, it was Dashner who telephoned Union Agent Ferguson to request a meeting for contract negotiations. There is also testimony by Ferguson at the hearing that ". . . recently . . . we reached an agreement on the contract." If I size up the whole case correctly, "recently"—i.e., before the hearing in this case—there was only one man in the contract bargaining unit. On that basis alone, Dashner had a right to refuse to deal with the Union at all. He did not. How can I find illegal motivation on such evidence against the overwhelming proof that whatever antagonism there was towards Tressler it antedated any union activity at all.

[Recommended Order for dismissal omitted from publication.]